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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1971

No. 71-1433

THOMAS BELLISTON, REED W. ASHCRAFT, WILLIAM M. BARR, BLAIR N. BARTON, JOE A. DANIELS, WIX FAILNER, LAWRENCE B. FORBUSH, DARRELL E. HERZOG, CLARENCE HOLLINGSHEAD, MAX JARDINE, BILL LEWIS, RAY SHIELDS, MARVIN E. THORNTON, WILLARD P. MCEWAN, and ALFRED C. NIELSEN,
Petitioners,

vs.

TEXACO, INC., *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONERS' REPLY MEMORANDUM, Rule 24(4)

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1. The Horizontal Price Fixing Claim.

The brief in opposition erroneously characterizes the opinion herein of the Court of Appeals upon the horizontal price fixing claim as based upon a holding of insuffi-

ciency of petitioners' evidence to make out a case of price fixing. The basis of the disposition in the Court of Appeals is described as a failure of proof.

In fact the Court of Appeals at no point discusses the sufficiency of petitioners' evidence to support a finding that respondent and the other majors have agreed upon a course of conduct which affects the price of gasoline. At least two salient items of petitioners' proof of horizontal price fixing are not even mentioned in the opinion below (or in the brief in opposition); these are: 1) Texaco's adoption of the metropolitan Salt Lake price zones established by the American Oil Company, after obtaining from American its price zone map and revisions thereof; 2) the use of the price exchange procedure for upward as well as downward price moves.

In fact the disposition of the horizontal price fixing claim in the Court of Appeals was based upon three new defenses, all of which are without precedent in the case law, and all of which will find ready and widespread use far beyond the perimeters of this action to justify agreements to exchange prices, especially discounts off book prices and removal of such discounts. These are:

1. The Robinson-Patman compliance defense. A competitor is justified in not lowering his price until he has ascertained *from his competitors* that they have lowered their price. Nor will he re-raise his price until he has learned from his competitors that they have done so. Referring to the Court of Appeals' adoption of language from the *Wall Products* case, (App. A, pp. xv-xvi), this defense is of a plenary nature and justifies even exchange agreements which tend to restrain lower prices.

2. The reasonable prices defense. An agreement to exchange prices is not unlawful if price fluctuation during the damage period can be shown. Here the Court of Appeals substituted its view of the facts for that of the jury, which on the injurious impact issue found that the exchange tended to prevent lower prices which otherwise would have prevailed. This rule undercuts the *per se* illegality of agreements among competitors which affect prices, it confuses the issues of violation and injurious impact, and engrafts upon Sherman Act price fixing offenses a new element of proof, anticompetitive effect.

3. The public availability defense. If price information, including, for example, 48 hour discounts for a particular segment of a market which otherwise is not published, is made publicly available to all persons, then the mutual exchange among competitors of such prices is not secret or clandestine and is therefore lawful. In this regard the brief in opposition, like the opinion of the Court of Appeals, continues to blur the crucial distinction between the tankwagon, a nationally known "book" price, and the granting or removal of temporary allowances or discounts therefrom, which occurs in particularized situations. It is the operation and effect of the price exchange with regard to the latter of which complaint is made herein.

2. The Robinson-Patman Act Claim.

Commerce. Respondent's attempt to distinguish *Littlejohn v. Shell Oil Co.*, 456 F.2d 225 (5th Cir. 1972), which conflicts with the opinion below upon the important issue of the Federal Courts' jurisdiction to entertain an action under the Robinson-Patman Act (15 U.S.C. 13a), is misleading:

> "His claim, of the primary line variety, was that he was injured by defendants' low price sales to those dealers who were his local competitors, *which low prices were subsidized by higher priced sales to other customers in a different state.*" Brief in Opposition, p. 17 (emphasis added).

In fact, Littlejohn did not complain of any prices or sales outside the state of Texas. He complained that American and Shell's prices in Garland, Texas, where his station was located, were lower than American and Shell's prices in Dallas, and that this discrimination was made possible by the interstate profits of American and Shell. In *Littlejohn* all discriminatory sales at issue were of gasoline which had been refined and sold all within the state of Texas, and no sales across state lines were alleged. Nor does the language of the Act make any distinction for purposes of commerce between primary and secondary line actions. *Littlejohn* is in direct conflict with the opinion below.

Respondent does not dispute that the opinion below creates wholesale exemption for the petroleum industry from the Robinson-Patman Act. Nor does it dispute that when read with the Detroit jobber case, *F.T.C. v. Standard Oil Co.*, 340 U.S. 231 at pp. 236-8 (1950), the opinion below causes remaining Federal jurisdiction to be arbitrary and inconsistent, creating, for example, the result that in the same state one oil company may be subject to the Act and another not.

3. Other Issues.

There was no stipulation, written, oral, or otherwise, respecting the cost of printing the trial transcript. Ab-

sent a stipulation, the Court of Appeals' discretion to award costs is limited to costs which are *necessary*. (28 U.S.C. 1924).

In general, respondent's contention appears to be that if it does not win its case on the issues determined in the Court of Appeals, it will win it on other issues, for example, the conduct of the trial, or proof of damages. Unlike the plenary defenses and lack of jurisdiction found below, such issues whether determined here or in the Court of Appeals may result in a new trial as opposed to judgment for respondent, if not judgment for petitioners. It is clear that respondent's confident assertion does not present a valid reason for this Court to leave standing a decision which seriously undercuts the policy of competitive free enterprise and offers no hope at all to the many gasoline dealers in the country.

The writ should issue.

Respectfully submitted,

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June 6, 1972